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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RONALD ANTHONY ALKINS, Defendant and Appellant.	G048643 (Super. Ct. No. C-86929) O P I N I O N

Appeal from orders of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed in part; dismissed in part.

Alan Macina for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood, Meagan J. Beale, Felicity Senoski, and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Ronald Anthony Alkins appeals from the trial court's orders denying his motion to set aside his felony conviction and, alternatively, to reduce his 1991 felony conviction to a misdemeanor. He argues the trial court erred in denying his motion because he was not properly advised of the immigration consequences of his guilty plea in 1991. We affirm the trial court's May 10, 2013, order denying his motion to set aside his 1991 felony conviction. We dismiss Alkins's appeal from the court's August 27, 2013, order denying his motion to set aside his 1991 felony conviction and alternatively denying his motion to reduce that felony conviction to a misdemeanor.

FACTS

On August 12, 1991, an information charged Alkins with attempted murder (Pen. Code, §§ 664, 187, subd. (a), all further statutory references are to the Penal Code, unless otherwise indicated), two counts of assault with a firearm (§ 245, subd. (a)(2)), discharging a firearm with gross negligence (§ 246.3), and child abuse (§ 273a, subd. (1)), and alleged he personally used a firearm as to all but the discharging a firearm offense (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)). Later that year, Alkins pleaded guilty to assault with a firearm (§ 245, subd. (a)(2)), and admitted he personally used a firearm (§ 12022.5, subd. (a)). The maximum possible prison term was nine years.

Under penalty of perjury, Alkins signed a *Tahl* form (*In re Tahl* (1969) 1 Cal.3d 122, 133, fn. 6), which stated he personally initialed each of the boxes, discussed his rights and obligations with his attorney, and waived his rights to enter a plea. His attorney, John Meyers, signed the *Tahl* form, which stated he had explained Alkins's rights to him and concurred in Alkins's decision to waive his rights. The factual basis for the plea was as follows: "On July 4, 1991, in Orange County, I shot a firearm at Michelle Malone with the intent to hit her." Alkins either initialed or put an "X" in all the relevant boxes, including putting his initials in the box next to the following language: "I understand that if I am not a citizen of the United States the conviction for

the offense charged may have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

There was a hearing on November 1, 1991, but a transcript of that hearing is not part of the record on appeal. In exchange for his guilty plea, the trial court, Judge John M. Watson, dismissed the other charges, which included the attempted murder charge. The minute order from that day indicates Alkins was in court with Meyers. The minute order also indicates Alkins was advised of and waived his legal and constitutional rights. Additionally, the minute order states Alkins was advised of the consequences of his plea if not a United States citizen. The court suspended imposition of sentencing and placed Alkins on probation for three years. The court ordered he serve 365 days in jail and awarded him credit of 181 days. Alkins did not appeal.

Almost 16 years later, on October 24, 2007, Alkins filed a motion to reduce his 1991 felony conviction to a misdemeanor. The next day, Alkins also filed a petition for modification of sentence, requesting his sentence be modified from 365 days in jail to 364 days. Alkins requested the sentence be modified "for [i]mmigration purposes." He stated the following: "[Alkins] is a [l]egal [p]ermanent [r]esident whom now wishes to apply for U.S. [c]itizenship. Under current [i]mmigration [l]aw, [Alkins] will not be eligible to become a U.S. [c]itizen, and/or he may suffer other severe [i]mmigration consequences, unless the sentence is modified to less that [*sic*] 365 days county jail and that order is effective as of the date he was originally sentenced." The district attorney objected to Alkins's motion to reduce his felony conviction to a misdemeanor. The trial court denied Alkins's motion to reduce without prejudice.

Over five years later, Alkins filed a motion to withdraw his 1991 guilty plea. The basis for Alkins's motion was "the record does not reflect that he was advised of the potential immigration consequences" of his 1991 plea as required by section 1016.5, and he faced "an actual risk of deportation." Alkins added "[h]e only recently learned" he was at risk of deportation.

Alkins's motion was supported by his declaration, which detailed he lawfully entered the United States in 1967 on a student visa and became a lawful permanent resident the following year. Alkins detailed his military service history, education history, work history in accounting and financial services, family history, including five biological daughters who are all United States citizens, and many stepdaughters, grandchildren, and great-grandchildren all in the United States, and health history including a March 2011 cancer diagnosis. After recounting his 1991 plea, Alkins contended he could not remember his attorney or the trial court mentioning any immigration consequences that could arise from his guilty plea. He admitted "immigration issues were the furthest thing from [his] mind." He had been in jail four months, his first time in custody, and his attorney told him if he signed the plea he would be released. But he asserted he would not have pleaded guilty if he knew he might be deported or he would be prevented from becoming a United States citizen. Alkins explained that in 2007 when he investigated applying for United States citizenship, he learned his 1991 felony conviction barred him from becoming a citizen. After consulting with a criminal defense attorney, Alkins filed his 2007 motions. After the trial court denied his 2007 motion to reduce his 1991 conviction, "it took [him] some years to put aside legal fees and time to address this problem." Alkins stated he was concerned deportation would negatively impact receiving Social Security benefits and Veterans Affairs medical benefits after living in the United States for 45 years. He said that since the 1991 conviction, he had only a few traffic tickets and a misdemeanor "wet reckless."

Alkins's motion was also supported by Meyers's declaration. Meyers stated the following: "I have no specific recollection of . . . Alkins's case or any details related to the plea in this case. As such, I cannot say whether I advised . . . Alkins of any immigration consequences at the time of the plea, nor whether the court discussed immigration consequences during the proceedings."

Finally, Alkins's motion was supported by a declaration from an immigration attorney, Carlos Batara, who stated Alkins could be immediately deported and lose his medical benefits because of his 1991 conviction.

On May 10, 2013, the trial court, Judge Gregg L. Prickett, denied Alkins's motion to vacate the judgment by written order. The court explained Alkins filed a motion to set aside his plea because the court in 1991 did not comply with section 1016.5, and his defense counsel was ineffective.

The court detailed the circumstances of the 1991 conviction, which it gleaned from the preliminary hearing transcript; the preliminary transcript is not part of the record on appeal. Alkins and his wife were in the process of getting a divorce, but he lived with his stepdaughter. Earlier that day, Alkins and his girlfriend argued, and Alkins was intoxicated and angry. Alkins went into his stepdaughter's room and told her to move out within a couple days. She agreed and Alkins left the room. Alkins returned to the room and told her to move out immediately. She said she needed time to pack, and Alkins demanded she move out immediately. When she did not comply, Alkins pulled a gun from his waistband and fired while standing only a few feet away from her. The bullet went through the window. Both the stepdaughter's and the girlfriend's daughter's statements to police immediately after the shooting tend to establish Alkins fired the gun at the stepdaughter and the bullet barely missed both of them. However, their testimony at the preliminary hearing was that Alkins did not point the gun at either of them.

The court discussed Alkins's declaration, recognizing his personal and professional achievements. The court noted Alkins had "no recollection of being advised of immigration consequences by either the court or defense counsel." The court also noted Meyers "has no specific recollection of the case or of the plea" and thus "'cannot say whether he advised [Alkins] of any immigration consequence at the time of the plea.'" Finally, the court noted Batara's opinion Alkins could be immediately deported and lose his medical benefits.

The trial court "presume[d]" Alkins brought his motion with reasonable diligence. Relying on section 1016.5 and *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183 (*Zamudio*), the court concluded Alkins was properly advised of the immigration consequences of his guilty plea based on the court's minute order and his plea and waiver form. Assuming for the purposes of argument the immigration advisement was inadequate, the court opined Alkins was not prejudiced because it was not reasonably probable he would not have pleaded guilty. The court noted Alkins was charged with five felonies, he had been in jail four months, and he was not thinking about immigration consequences. The court concluded Alkins's major concern was being released and thus his claim he would not have pleaded guilty had he known the immigration consequences of his guilty plea was unpersuasive. The court concluded it could not consider Alkins's ineffective assistance of counsel claim.

On June 26, 2013, Alkins filed a supplemental brief on his motion to withdraw his 1991 guilty plea, and alternatively, a request to reduce his conviction from a felony to a misdemeanor pursuant to section 17, subdivision (b). On July 1, 2013, Alkins filed a notice of appeal from the May 10, 2013, order denying his motion to vacate.

On August 27, 2013, Judge Prickett denied Alkins's motions by written order. With respect to the renewed motion to vacate, the court stated it did not have jurisdiction to consider the motion because Alkins filed a notice of appeal from the court's May 10, 2013, order denying his original motion and the subject matter of the motions are identical. Assuming the court had jurisdiction to consider Alkins's motion to reduce his felony to a misdemeanor, the court denied the motion. The court briefly noted Alkins's personal, military, and professional achievements. The court stated that although Alkins had remained relatively crime free since 1991, other than the "wet reckless" (§ 23103.5, subd. (a)), and for over 20 years he was "industrious and productive," the court denied his request to reduce his felony to a misdemeanor because the offense was serious and could have resulted in serious injury.

On January 27, 2014, Alkins filed a late notice of appeal from the May 10, 2013, and August 27, 2013, orders denying his motions to vacate, and a certificate of probable cause after this court filed an opinion granting him leave to do so (*In re Ronald Anthony Alkins* (Jan. 9, 2014, G049370) [nonpub. opn.]).

DISCUSSION

I. Section 1016.5

Alkins argues neither the trial court nor defense counsel properly advised him of the immigration consequences of his 1991 guilty plea. We disagree.

Section 1016.5, subdivision (a), states: "Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

Section 1016.5, subdivision (b), provides in relevant part: "If . . . the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement."

To obtain relief under section 1016.5, a defendant must demonstrate each of the following: (1) the court taking the plea failed to advise defendant of the immigration consequences as provided by section 1016.5; (2) as a consequence of his

conviction on the offense to which he pleaded guilty, there is more than a remote possibility the defendant faces one or more of the statutorily specified immigration consequences; and (3) the defendant was prejudiced by the court's failure to provide complete advisements under subdivision (a) of section 1016.5. (*Zamudio, supra,* 23 Cal.4th at p. 200.)

Prejudice requires the defendant to establish it is reasonably probable he would not have pleaded guilty if properly advised. (*People v. Martinez* (2013) 57 Cal.4th 555, 559, 562 (*Martinez*) [citing *Zamudio*].) The test is not whether there is a reasonable probability of a more favorable outcome had the plea been rejected, but rather whether there is a reasonable probability the defendant would have decided to reject the plea. (*Martinez, supra,* 57 Cal.4th at pp. 559, 562.) The strength of the prosecution's case against the defendant is a relevant factor to consider when deciding whether the defendant would have accepted or rejected the plea offer had the proper advisements been provided. (*Id*. at p. 564.) We review the trial court's ruling denying the motion to vacate a judgment for abuse of discretion. (*Zamudio, supra*, 23 Cal.4th at p. 192.)

Here, the Attorney General argues this court can affirm if the trial court's judgment was correct on any legal ground and "delay" justified the court's order. Despite Alkins's insistence he first learned his 1991 felony conviction made him subject to deportation when he spoke with Batara in 2012, in his October 2007 petition to modify his sentence, Alkins recognized his conviction/sentence carried "other severe [i]mmigration consequences." Alkins filed his petition five years later, which we would conclude is untimely. (*People v. Kim* (2009) 45 Cal.4th 1078, 1098 [petition not filed for almost seven years after the defendant first aware of possible deportation untimely].) Nevertheless, because the trial court "presumed" Alkins's motion was timely, we address the merits of his contention.

As to the merits, *People v. Ramirez* (1999) 71 Cal.App.4th 519 (*Ramirez*), is instructive. In that case, the court held the trial court complied with section 1016.5's

requirements when the required advisements were contained in a written plea form rather than given orally by the trial judge. When taking the plea, the judge failed to advise defendant orally of the immigration consequences of his plea. But defendant had signed a change of plea form that "warned of all three possible [immigration] consequences in precise statutory language." (*Id.* at p. 523.) The court rejected defendant's contention section 1016.5 requires the court to orally advise defendant of the immigration consequences of his plea. (*Ramirez, supra,* 71 Cal.App.4th at pp. 521-522.) The court explained "there is no language in the statute requiring [oral] advisements by the court . . . . [T]he legislative purpose of section 1016.5 is to ensure a defendant is advised of the immigration consequences of his plea and given an opportunity to consider them. So long as the advisements are given, the language of the advisements appears in the record for appellate consideration of their adequacy, and the trial court satisfies itself defendant understood the advisements and had an opportunity to discuss the consequences with counsel, the legislative purpose of section 1016.5 is met." (*Id.* at p. 522.)

We agree with Alkins the trial court's minute order by itself is insufficient to establish he was properly advised of the immigration consequences of his guilty plea. (*People v. Castro-Vasquez* (2007) 148 Cal.App.4th 1240, 1244-1245; *People v. Dubon* (2001) 90 Cal.App.4th 944, 954-955.) But here, like in *Ramirez,* there was more—the minute order and the *Tahl* form.

Although the record does not include a transcript of the plea hearing, the record does establish Alkins was sufficiently advised of the immigration consequences of his guilty plea. Alkins and his attorney signed the guilty plea form, and Alkins initialed the provision that stated: "I understand that if I am not a citizen of the United States the conviction for the offense charged may have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." This provision "contains all components of an adequate warning of the consequences for a noncitizen of pleading guilty to a felony offense." (*Ramirez,*

supra, 71 Cal.App.4th at p. 521.) Contrary to his claim otherwise, Alkins's initials demonstrate he was aware he could be deported if he was not a United States citizen and he pleaded guilty to the felony. Alkins also put an "X" next to the statement he signed the guilty plea form under penalty of perjury, declaring that he had read, discussed with his attorney, understood, and personally initialed each item. Alkins's signature follows this statement. The record does not contain any evidence Alkins did not read or understand the guilty plea form before signing it. Alkins's defense counsel signed the guilty plea form, asserting he had explained each of the rights listed in the form to Alkins. The record includes no evidence defense counsel routinely signs the guilty plea form without reading it. And the trial court's minute order indicates Alkins was advised of the consequences of his plea if he was not a United States citizen.

We take issue with Alkins's claim his defense counsel, Meyers, in his declaration stated he could not remember advising Alkins of the immigration consequences of his guilty plea. Meyers did *not* state "he did not remember advising—nor remembers the court advising—[Alkins] about immigration concerns[]" as Alkins suggests. What Meyers declared was: "I have no specific recollection of . . . Alkins's case or any details related to the plea in this case. As such, I cannot say whether I advised . . . Alkins of any immigration consequences at the time of the plea, nor whether the court discussed immigration consequences during the proceedings." Meyers's statement cannot be read to support the conclusion he failed to properly advise Alkins of the immigration consequences of his guilty plea. Simply put, he does not remember Alkins's 22-year-old case and thus can provide no insight as to what transpired**.** We caution appellate counsel not to overstate or misrepresent the record under the cloak of effective advocacy because it, at the very least, violates court rules. (Cal. Rules of Court, rule 8.204(a)(1)(C)).

Finally, assuming for the purpose of argument Alkins was not properly advised, he was not prejudiced as it was not reasonably probable Alkins would have

decided to reject the plea. Alkins faced five charges, including an attempted murder charge. Although the two witnesses to the shooting testified at the preliminary hearing Alkins did not fire the gun at them, immediately after the shooting they told officers he did point the gun at the stepdaughter and fire the weapon. Those prior inconsistent statements would likely be admitted at trial. (Evid. Code, §§ 1235, 770.) Additionally, in his declaration Alkins stated he had been in jail four months, it was his first time being incarcerated, his counsel told him if he agreed to plead guilty he would be released, and "immigration issues were the furthest thing from [his] mind."

It was reasonable to infer from the charges and Alkins's own statements he would have pleaded guilty regardless of the immigration consequences and despite the fact he has spent the majority of his life raising a family and building a career in the United States. Unlike Alkins's defense counsel, we would not characterize the trial court's interpretation of Alkins's statements as "gross and unreasonable." Instead, we conclude the trial court properly found Alkins would have pleaded guilty regardless of the immigration consequences based on the charges and his statements. Thus, Alkins's repeated claims there was no oral record of the proceedings is unpersuasive because the *Tahl* form and the minute order establish Alkins was sufficiently advised of the immigration consequences of his guilty plea.

II. Section 17

Alkins contends the trial court erred in denying his motion to reduce his 1991 felony conviction to a misdemeanor. We dismiss his appeal.

"As a general matter, '[t]he filing of a valid notice of appeal vests jurisdiction of the cause in the appellate court until determination of the appeal and issuance of the remittitur.' [citation.] By the same token, the notice of appeal divests the trial court of subject matter jurisdiction. [Citations.] 'Because an appeal divests the trial court of subject matter jurisdiction, the court lacks jurisdiction to vacate the judgment or make any order affecting it. [Citations.] Thus, action by the trial court

while an appeal is pending is null and void. [Citations.] Indeed, "[s]o complete is this loss of jurisdiction effected by the appeal that even the consent of the parties has been held ineffective to reinvest the trial court with jurisdiction over the subject matter of the appeal and that an order based upon such consent would be a nullity." [Citation.]' [Citation.] [¶] 'The purpose of the rule depriving the trial court of jurisdiction pending appeal "'is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment . . . by conducting other proceedings that may affect it.' [Citation.]"' [Citation.] [¶] There are, however, exceptions to the general rule. The trial court retains jurisdiction to vacate a void, but not a voidable, judgment. [Citation.] 'A judgment is void rather than voidable only if the trial court lacked subject matter jurisdiction.' [Citation.] The trial court also retains jurisdiction to correct clerical errors in the judgment [citation] or to correct an unauthorized sentence [citation]. Finally, under section 1170, subdivision (d), the trial court retains jurisdiction to recall a sentence in a criminal matter and to resentence the defendant notwithstanding the pendency of an appeal. [Citation.]" (*People v. Nelms* (2008) 165 Cal.App.4th 1465, 1471-1472.)

Here, Alkins filed a supplemental brief on his motion to withdraw his 1991 guilty plea, and alternatively, a request to reduce his conviction from a felony to a misdemeanor pursuant to section 17, subdivision (b), on June 26, 2013. He then filed a notice of appeal from the May 10, 2103, order denying his motion to vacate five days later on July 1, 2013. But the matter did not come before Judge Prickett until August 27, 2013, after Alkins filed his notice of appeal. Because Judge Prickett lacked jurisdiction to consider Alkins's renewed motion, the August 27, 2013, order denying his motion did not affect his substantial rights and therefore is not an appealable order. (*People v. Turrin* (2009) 176 Cal.App.4th 1200, 1208.) As a nonappealable order, it must be dismissed. (*Ibid*.) Assuming for the sake of argument it was an appealable order, the trial court properly denied his motion to reduce his felony conviction to a misdemeanor.

A court had broad discretion under section 17, subdivision (b), in deciding whether to reduce a wobbler offense to a misdemeanor. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) We will not disturb the court's decision on appeal unless the party attacking the decision clearly shows the decision was irrational or arbitrary. (*Ibid*.) Absent such a showing, we presume the court acted to achieve legitimate sentencing objectives. (*Id*. at pp. 977-978.) Here, Alkins cannot show Judge Prickett's decision was arbitrary. There was evidence before him from which one could reasonably conclude Alkins was intoxicated and fired a gun at his stepdaughter's head. Needless to say, he could have killed her. The fact the two witnesses later changed their testimony and that no one was injured does not negate the fact a jury could have relied on the witnesses' statements to convict Alkins of attempted murder. Thus, the court acted properly in denying Alkins motion to reduce his felony conviction to a misdemeanor.

DISPOSITION

The trial court's May 10, 2013, order is affirmed. We dismiss Alkins's appeal from the court's August 27, 2013, order.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

BEDSWORTH, J.